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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

J. MICHAEL ROBILOTTO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Whether under the "fictitious services" exception to the labor exemption under *United States* v. *Enmons*, 410 U.S. 396 (1973), the *Hobbs Act* applies to a union official who threatens a work stoppage based upon the employer's refusal to pay for non-present employees whom the union official personally believes to have been hired and present at the job site as a result of legitimate arm's length negotiations.

2. Whether there is legally sufficient proof for *Hobbs Act* purposes where the purported victim neither experiences nor expresses any fear of any inappropriate work stoppage as a result of the union official's representations.

3. Whether a prosecution under 18 U.S.C. § 1954 requires proof that the accused either directly or indirectly possessed the ability to influence a union welfare fund investment decision.

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No.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Parties to the Proceedings Below

J. Michael Robilotto* petitions this court for a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of conviction entered in the United States District Court for the Northern District of New York (Hon. Lee P. Gagliardi), upon a prosecution brought by the government of the United States.

* Co-defendants Louis D. Spagnola and Anthony V. Civitello, who were also convicted after trial, are not parties to this petition.

Jurisdiction

The decision and order of the Court of Appeals affirming the judgment of conviction was entered on September 11, 1987 (Appendix A) and is reported under *United States* v. *Robilotto*, 828 F.2d 940 (2nd Cir. 1987). The order of the Court of Appeals denying the petition for rehearing was entered on October 6, 1987 (Appendix C).

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

Statutes Involved

18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. § 1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan

Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of

or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: *Provided,* That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

Statement of the Case

A. Overview of the Indictment

Pursuant to an indictment filed in the United States District Court for the Northern District of New York on March 14, 1986, which was superseded by a fifty (50) count indictment filed on April 24, 1986, petitioner J. Michael

Robilotto, a member and elected business agent of Albany Local 294 of the Teamsters Union, along with co-defendants Louis D. Spagnola and Anthony V. Civitello, was charged with a host of offenses based on essentially two distinctly theorized criminal schemes. Such schemes purportedly arose out of the three defendants' varying relationships with Albany Local 294, the alleged RICO "enterprise".

One such scheme was the alleged effort on the parts of Spagnola and Civitello to obtain improper payments from Universal City Studios, an employer of teamsters, which had been producing a film in the Albany, New York area. Spagnola and Civitello's actions also allegedly entailed the commission of mail fraud and tax violations with respect to such payments. Petitioner Robilotto was named in only one count out of the thirty-seven (37) counts devoted to that scheme, exclusive of counts 1 and 2, the RICO counts, regarding which—obviously for Fed.R.Cr.P. 8(b) joinder purposes—that one count was included as a predicate act. Other than that one count, petitioner Robilotto had absolutely no connection either to co-defendant Civitello or the Universal part of the case.

The second scheme centered around the purported activity of Robilotto and Spagnola—approximately 1-2 months after the Universal phase of the indictment had ended—toward securing loans from the Fulton County National bank in return for the deposit of funds by the Albany Area Trucking and Allied Industries Health and Welfare Fund, which was a fund within the meaning of 29 U.S.C. § 1001, *et seq.*, as contemplated by 18 U.S.C. § 1954. It was alleged that Robilotto, a local union official, used influence with the wholly independent Health and Welfare Fund to ensure

such deposits in return for the loans, and that co-defendant Spagnola was chargeable as an aider and abettor under 18 U.S.C. § 2.

B. The Charges against Petitioner J. Michael Robilotto

1. The Universal Scheme

With respect to the Universal City Studios phase of the case, petitioner Robilotto was charged under count 33 with a Hobbs Act violation under 18 U.S.C. § 1951, which, in turn, was the sole predicate act concerning Robilotto under counts 1 and 2, the substantive RICO and RICO conspiracy, pursuant to 18 U.S.C. §§ 1962(c) and (d). In fact, as noted, aside from count 33, Robilotto had absolutely no connection in the Universal scheme either to Civitello or Spagnola, both of whom, either individually or together, were charged without Robilotto in 34 of the 37 Universal-related counts which included Taft-Hartley violations, mail and tax fraud, and the two umbrella RICO charges.

As to the all important count 33, such was the sole Universal-related charge to which the Government has pointed in order to justify Robilotto's joinder in the indictment under Fed.R.Cr.P. 8(b). It was there alleged that Robilotto and Civitello agreed to obtain Universal's property by the wrongful use of actual and threatened force, violence and fear by threatening a work stoppage in conversations with Universal's Daniel Slusser, in connection with the production of the movie "Ghost Story". Such stoppage was to occur "unless and until Universal, its officers, employees and agents paid wages for the unwanted unnecessary and fictitious services of employees known as 'cover drivers' ", between January 19th, and May 16, 1981.

As to Robilotto, the only overt acts alleged—and indeed, the only evidence whatsoever of his purported agreement—was his "attend[ing] a meeting at the Holiday Inn, in Saratoga Springs, New York", in the last week of April, 1981, at which time he spoke by transcontinental telephone call to Daniel Slusser in California.

2. The Welfare Fund Scheme

As concerns the wholly distinct purported scheme regarding loans from the Fulton County National Bank in return for Health and Welfare Fund deposits, which was alleged to have commenced on August 20, 1981, three months after the alleged Universal scheme had ended, petitioner Robilotto was charged in eleven counts, ten of which were theorized as predicate acts under the two RICO counts. Specifically, counts 38-47 charged that Robilotto as a principal, and Spagnola as an aider and abettor, knowingly solicited and received funds from the bank "because of and with the intent to be influenced with respect to the actions, decisions and other duties of J. Michael Robilotto relating to questions and matter concerning the Welfare fund, that is, the deposit of Welfare fund assets."

Finally, under count 48, Robilotto and Spagnola were charged with a conspiracy from July, 1981, through January 31, 1984, in violation of 18 U.S.C. § 371, to commit the three object crimes of violations of 18 U.S.C. §§ 656, 1005 and 1014. As noted, count 48 was not a predicate act for the RICO counts, since the crime alleged was outside the ambit of 18 U.S.C. § 1961(1)(b).

C. Pre-trial Proceedings

Prior to trial, petitioner Robilotto moved for various forms of relief. They included, *inter alia,* dismissal of counts 1, 2 and 33 on the ground, *inter alia* that count 33 contemplated lawful and protected union activity on petitioner's part as explained in the Supreme Court case of *United States* v. *Enmons,* 410 U.S. 396 (1973), and dismissal of counts 38-47 on the ground that defendant, as a local union official in Albany, bore absolutely no factual or legal connection to the Health and Welfare Fund in New York City.

D. Summary of Arguments to the Court of Appeals

On appeal from his resulting judgment of conviction, petitioner renewed his claims, *inter alia,* that, as a matter of law, the §§ 1951 and 1954 charges against him were facially invalid due to the respective contentions that he did nothing beyond what was protected union activity and that he bore absolutely no direct or indirect connection to the Health and Welfare Fund. It was also alleged that for other reasons, including the absence of proof of the presence of fear on the part of the "victims" in count 33, the lack of conspiratorial agreement, and the absence of any connection on petitioner's part to the Health and Welfare Fund, count 33 and counts 38-47 were all unsupported by legally sufficient evidence.

E. The Court of Appeals' Decision

In an opinion supporting its affirmance of petitioner's conviction of all charges (Appendix A), the Second Circuit essentially re-wrote the indisputable record of trial. *See,* Appendix B (petition for re-hearing before the Court of

Appeals). Thus, finding, *inter alia,* that the "cover" drivers, which were the subjects of the Universal scheme, were indeed "superfluous and fictitious" and that they had been hired as a result of threats of labor unrest, the Court held that the labor exception to the *Hobbs Act* carved out in *United States* v. *Enmons,* 410 U.S. 393 (1973), did not preclude petitioner's conviction.

As to the § 1954 convictions, the Court held that such statute "on its face, does not necessarily require proof that the malefactor actually possessed the ability to influence a welfare fund's investment decisions". Appendix A at A13. Finding, therefore, that despite the absence of such proof, the evidence adduced supported findings that petitioner intended to, and did in fact, influence the Health and Welfare fund's investment decisions, the convictions under § 1954 were upheld as well.

F. Petition for Rehearing

In a timely petition for rehearing, *See,* Appendix B, petitioner took strong issue with the Court of Appeals' misapprehension, if not gross distortion, of the trial record regarding the evidence supporting both the § 1951 and § 1954 allegations. Thus, it was pointed out, with specific support from the trial record, that petitioner always believed that cover drivers were the result of arms' length negotiations and that they had indeed been present at the job site. It was also shown, absolutely contrary to the Court of Appeals' determination that petitioner had "conced[ed] that the cover drivers were both superfluous and fictitions", Appendix A at A10, that it was always the belief of petitioner, who the record shows was rarely at the scene, that they had been continually present and available.

Additionally, the petition for rehearing conclusively demonstrated that the witness Daniel Slusser, the Universal representative whom the Government theorized was the recipient of petitioner's threats, had never been in fear of an actual work stoppage following either of the two subject conversations with Petitioner. Appendix B, pp. A27-A29. It was thus urged that in the absence of such evidence of fear, the *Hobbs Act* violation charged was insufficiently supported as a matter of law.

With respect to the § 1954 counts, petitioner noted that the Court of Appeals conspicuously ignored the testimony of John C. Peet, one of two trustees of the Health and Welfare fund who testified that not only had Petitioner, a union official, no connection with the fund whatsoever, but that it had been Peet's own independent decision, absent any request or knowledge of Robilotto, to deposit the Health and Welfare funds in the subject Albany bank. Peet added that the union itself was wholly distinct from the Health and Welfare fund with no legal nexus whatsoever. Appendix B, pp. A31-A32.

The Petition for Rehearing was denied in an order entered on October 6, 1987. Appendix C.

Reasons for Allowance of the Writ

It is petitioner's contention that the writ petitioned for herein should be allowed based upon three distinct issues, each involving "important question[s] of federal law which ha[ve] not been, but should be, settled by this Court . . .", Supreme Court Rules, Rule 17.1(c).

A. Petitioner's belief as to bona fides of non-present employees

In *United States* v. *Enmons*, 410 U.S. 396 (1973), this Court provided for a labor exception to the *Hobbs Act* under 18 U.S.C. § 1951 whereby such provision "does not apply to the use of force to achieve legitimate ends." 410 U.S. at 401. Admittedly, however, the Court also noted that where force is used for an unlawful purpose such as obtaining wages for "imposed, unwanted, superfluous and fictitious services of laborers," *id.* at 408 (*quoting United States* v. *Green*, 350 U.S. 415, 417 [1956]), prosecution under the *Hobbs Act* would still be appropriate.

Here, wholly distorting the record, the Second Circuit panel stated that Petitioner "conceded" that cover drivers "were both superfluous and fictitious". Appendix A at A10. It was also claimed that "Universal consented to the payment of the salaries only after threats of labor unrest made by Civitello and later by Robilotto". *Id.* The Court then conveniently concluded that "[i]t would be difficult to imagine a more obvious instance of imposed, unwanted, superfluous and fictitious labor services. *See United States* v. *Green*, 350 U.S. 415, 417 (1956)". *Id.*

Most respectfully, in taking a pure question of law which ought to be reviewed by this Court and converting it

into a result-oriented factual dispute, the Court of Appeals deprived petitioner of a much merited reversal and was thereby guilty of a gross miscarriage of justice. Nonetheless, the record of trial is clear: As demonstrated in the petition for rehearing below,

> . . . [T]he ultimate hiring of cover drivers was *never* shown to have been anything other than what Robilotto justifiably believed— and which Slusser confirmed—to have been the direct result of arm's length negotiations. On these premises, the drivers were simply never proven to have been "imposed, unwanted, superfluous or fictitious", *United States* v. *Enmons*, 410 U.S. 396, 408; *United States* v. *Green, supra,* at least as far as defendant was concerned. Appendix B at A26-A27.

This being so, the Court of Appeals' contrary ruminations notwithstanding, *id.*, the essential question presented in this petition for certiorari has not been passed upon by this Court in all the years since the *Enmons* decision, *viz.*, even if the employees are fictitious (which nonetheless is completely belied by the trial record herein [Appendix B at A23-A27]), where the union official *believes* they were properly bargained for, and, as a result, threatens a work stoppage if they are not further paid, is that an extortion under the *Hobbs Act?*

Clearly, it is one thing for *Enmons* to hold that superfluous and fictitious services are not within the labor exception; it is wholly another for such to be the situation where the accused, with complete justification, does not believe that the subject employees are superfluous and fictitious. In the latter instance, which, on this indisputable record (Appendix B), fully applies to the situation in which Petitioner found himself, the *scienter* element is completely

unestablished. Under such circumstances, any resulting conviction cannot be left undisturbed.

Stated differently, it has been confirmed by the lower courts that in labor cases, both the "means" and the "objective" must be wrongful within the meaning of 18 U.S.C. § 1951, and such must be conveyed appropriately to the jury. *Cf., United States* v. *Clemente,* 640 F.2d 1069, 1077 (2nd Cir. 1981). Hence, "before a *Hobbs Act* violation will lie, it must be demonstrated that the extortionist has no legitimate or lawful claim to the property he was attempting to obtain". *United States* v. *Baudin,* 486 F.Supp. 403, 405 (SDNY 1980). In the final analysis, therefore, it remains for this court to give its imprimatur to the requirement articulated by other courts that in a *Hobbs Act* prosecution it must be proved by the Government beyond a reasonable doubt, if any conviction is to be sustained, that the anticipated goals of the actor, as well as his means, were wholly illegitimate. *Cf. United States* v. *Stofsky,* 409 F.Supp. 609, 616 (SDNY 1973, Pierce, J.). Clearly, such should be the uniform law, and this Court should finally so state.

Here, under *Enmons,* if the Petitioner/actor *believed* that his threatening a work stoppage so that *legitimately* bargained for cover drivers would be paid was wholly appropriate, because he knew them to be the lawful product of the "employer's agreement to legitimate collective bargaining demands", 410 U.S. at 399, then the later demand for expected payment, and any related threat, were not purposefully wrongful. In short, both the *means* and the *objective,* as far as Petitioner understood, were legitimate.

The decision in *Enmons* simply never addressed the issue of the justifiable belief, *vel non*, of the actor as to whether covered employees were in fact fictitious and superfluous. Owing to such void, as the Second Circuit's decision now reads, despite a union official's belief to the contrary, if employees are in fact ficticious the *Enmons* labor exemption will not apply. But as can be seen by this case (given the controlling and indisputable facts as more accurately reflected in the petition for rehearing [Appendix B]), for this court to allow such a rule to survive could result in a gross injustice. The instant petition should therefore be granted and the "fictitious" employee exception in *Enmons* sufficiently clarified in terms of the requisite *scienter*.

B. Need for the victim to have been placed in wrongful fear under the Hobbs Acts

Absent any applicable Supreme Court precedent, the Second Circuit recently held, *in banc*, that for legally sufficient evidence to exist under the *Hobbs Act*, there must be proof of a reasonable fear on the victim's part, first that the alleged extortionist had the power to harm the victim, and second, that he would exploit that power to his victim's detriment. *United State* v. *Capo*, 817 F.2d 947, (2nd Cir. 1987) (*in banc*). This case presents the Court with an opportunity to establish such principles as uniform federal law, and, in application to the instant facts, to correct what heretofore has been a monumental injustice.

The petition for rehearing herein makes clear that the witness Daniel Slusser, the Universal executive whom the Government called to establish its "fear" burden, simply never satisfied these essential principles. Appendix B at A27-A29.

Clearly, Slusser claimed that as soon as Petitioner agreed to a meeting in Arizona he felt much "easier" about any work stoppage. *Id.* at A28. Moreover, as a result of the meeting a few days later, the Universal executive "clearly recalled not having felt threatened, with any previous anxiety having disappeared . . .". *Id.*

On such proof, for the Court of Appeals to circumnavigate its own established principles by simply ignoring the record and thereby arriving at a result-oriented finding of evidentiary sufficiency, is a blatant perversion of justice.

The record is indisputable and the law is ripe for this court to settle firmly. The instant petition should be granted so that these principles can be nationally articulated, and a wholly innocent man, who did nothing more than properly, albeit fervently, represent his union, quickly vindicated.

C. Need for proof under 18 U.S.C. § 1954 that the accused possesses direct or indirect ability to influence the decision of a union welfare fund

Holding that the language of 18 U.S.C. § 1954 "does not necessarily require proof that the malefactor actually possessed the ability to influence a welfare fund's investment decisions", Appendix A at A13, the Second Circuit concluded that such statute applied to petitioner's conduct, regardless of the absence of proof—indeed, the undisputed proof was to the contrary—that petitioner had any direct or indirect ability whatsoever to influence welfare fund decisions, *citing, United States* v. *Soures*, 736 F.2d 87, 90 (3rd Cir. 1984); *United States* v. *Romano*, 684 F.2d 1057, 1064 (2nd Cir.), *cert. denied* 459 U.S. 1016 (1982); *United States*

v. *Freidland*, 660 F.2d 919 (3rd Cir. 1981), *cert. denied*, 456 U.S. 989 (1982); and *United States* v. *Palmeri*, 630 F.2d 192 (3rd Cir. 1980), *cert. denied*, 450 U.S. 967 & 983 (1981). Since the foregoing cases essentially constitute the sum of authorities construing this most significant statute, here again, there is presented "an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rules, Rule 17.1(c).

Clearly, for any court to hold that the absence of either potential ability or intent to influence the subject Health and Welfare fund's decision is irrelevant to the application of a statute which has as an essential element the accused's "... intent to be influenced with respect to, any ... actions, decisions or other duties relating to any questions or matter concerning such plan ...", 18 U.S.C. § 1954, is to unduly broaden a criminal statute well beyond the scope of its intended parameters. Here, the court below simply ignored all the proof offered by the actual trustee of the subject fund with the sole specific authority to make investment decisions, that, a) he had met petitioner only once; b) petitioner, as well as his local union, had absolutely no factual or legal connection to the welfare fund; and c) the trustee himself made the decision to invest welfare funds in the subject Albany Bank *absent any request from petitioner or any knowledge whatsoever that Petitioner ever had any loan outstanding*. Appendix B at A31-A33. (The Second Circuit also completely misapprehended the undisputed proof that Petitioner never spoke of *welfare* funds, but only of the wholly distinct *union* funds. *Id.*, at A33.)

This Court should clearly give its own interpretation to this important statute and finally determine if indeed

someone, such as Petitioner, with such a nonexistent direct or even indirect nexus to a theorized welfare fund can ever be prosecuted for investment decisions ultimately undertaken by such fund. On this unassailable record, to allow this conviction to stand, absent the voice of the highest court in the land, is to sanction prosecutions on statutory theories far beyond those ever envisioned by Congressional framers.

The language of the statute is clear: some direct or indirect influence over a theorized fund is essential. For the Second Circuit to rely upon *United States* v. *Soures, supra* and *United States* v. *Friedland, supra,* in furtherance of articulating the proposition that no "capacity" at all to influence a fund is necessary in order to come within the ambit of § 1954, is clearly to distort the holdings of a sister Circuit. Indeed, in *Soures* and *Friedland,* the Third Circuit never said that *anyone* who merely mentions the ability to influence a welfare fund is thereby prosecutable, but that there at least be an accused " who could *potentially* influence a future decision. . . ." *United States* v. *Soures, supra* at 90 *quoting United States* v. *Friedland,* at 926-927 (emphasis added). Hence for the Court below to apply the statute to Petitioner, who, the undisputed proof demonstrates, lacked even the potential to influence the fund, if upheld, would allow a prosecution of anyone who *merely boasted* such an ability, notwithstanding the absence of any direct or indirect nexus whatsoever. It remains for this court to finally address § 1954 and fully articulate the breadth of its applicability.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Dated: New York, New York
December 2, 1987

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1015, 1016, 1313—August Term, 1986

(Argued May 26, 1987 Decided September 11, 1987)

Docket Nos. 86-1513, -1514, -1515

UNITED STATES OF AMERICA,

Appellee,

—against—

J. MICHAEL ROBILOTTO, LOUIS D. SPAGNOLA and ANTHONY V. CIVITELLO,

Defendants-Appellants.

Before:

FEINBERG, *Chief Judge*,
LUMBARD and MINER, *Circuit Judges*.

Appeal from judgments of the United States District Court for the Northern District of New York (Gagliardi, J.) convicting appellants of RICO violations, Hobbs Act violations, mail fraud, conspiracy and related counts. All

three appellants were charged with various offenses stemming from their involvement in the production of the motion picture "Ghost Story." Two of the appellants also were charged with various offenses related to their efforts to obtain bank loans contingent upon deposits of employee welfare benefit plan funds.

Affirmed.

MARK M. BAKER, New York, NY (Barry Ivan Slotnick, Arthur J. Viviani, Slotnick and Baker, New York, NY, of counsel) *for Defendant-Appellant J. Michael Robilotto.*

JOHN L. MCMAHON, Saratoga Springs, NY *for Defendant-Appellant Louis D. Spagnola.*

(Anthony V. Civitello, Danbury, CT) *Defendant-Appellant pro se.*

FRANK J. MARINE, United States Department of Justice, Washington, DC (Frederick J. Scullin, Jr., United States Attorney, Syracuse, NY, Kevin E. McCormack, United States Department of Justice, Syracuse, NY, of counsel) *for Appellee United States of America.*

MINER, *Circuit Judge*:

Defendants-appellants J. Michael Robilotto, Louis D. Spagnola and Anthony V. Civitello appeal from judgments of the United States District Court for the Northern District of New York (Gagliardi, J.), convicting them of various offenses arising from their association with Local Union No. 294 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 294"). Each appellant was charged with various counts of a 50-count superseding indictment, including substantive RICO violations, 18 U.S.C. § 1962(c) (1982); RICO conspiracy, *id.* § 1962(d); Hobbs Act conspiracy and substantive Hobbs Act violations, *id.* § 1951; mail fraud, *id.* § 1341; receiving benefits to influence the operation of an employee welfare plan, *id.* § 1954; receiving illegal payments as an employee representative, 29 U.S.C. § 186(b)(1) (1982); conspiracy to misapply bank funds and to make false book entries and false statements in credit applications, *see* 18 U.S.C. § 371 (1982); and filing false federal income tax returns, 26 U.S.C. § 7206(1) (1982).

On appeal, Robilotto contends primarily that the Hobbs Act count on which he was convicted failed to state a criminal offense. He also challenges the sufficiency of the evidence to support his convictions for extortionate conspiracy and for receiving benefits to influence the operation of an employee welfare plan. He argues as well for reversal of his RICO convictions on the ground that there was an insufficient nexus between the pattern of racketeering shown and the affairs of the charged enterprise. Spagnola challenges the district court's entry of a RICO forfeiture judgment against him.

Civitello claims primarily that the charges against him were barred by the applicable statute of limitations. We affirm.

I. BACKGROUND

Although appellants raise numerous claims, only a few merit discussion. We summarize below only those facts necessary for a full understanding of the discussion that follows. The evidence adduced at trial demonstrated the existence of two criminal schemes pertinent to this appeal. The first scheme had its genesis in the negotiations for a collective bargaining agreement between Universal City Studios ("Universal") and Local 294 to supply drivers in connection with production of the film, "Ghost Story." Robilotto served as a business agent for Local 294 on the film.[1] Civitello acted as a job steward and captain for Local 294 on the film and Spagnola acted as an assistant or co-steward and co-captain.[2] The second scheme involved efforts by Robilotto and Civitello to obtain loans from the Fulton County National Bank, in exchange for which Robilotto agreed to arrange for substantial deposits in the bank from the Albany Area Trucking and Allied Industries Health and Welfare Fund ("Health and Welfare Fund").

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1 A business agent's duties include negotiating collective bargaining agreements and working conditions, handling union members' grievances, appointing and supervising shop stewards and selecting the union members to be employed.

2 A steward's duties include settling grievances from union members on a job site and reporting unresolved grievances to the business agent. A captain coordinates the employer's transportation needs, including supplying vehicles, hiring drivers and directing the drivers to their assigned tasks.

A. *The Cover Driver Scheme*

After some preliminary negotiations, Robert Brown, a production manager employed by Universal, came to the Albany, New York area in November 1980 to prepare for filming of the motion picture "Ghost Story." Brown met with Civitello to negotiate an agreement with Local 294 to use local teamster drivers on the film. Brown and Civitello reached agreement as to wages and fringe benefits. Civitello then proposed that Universal hire local drivers as "cover drivers" for some of the jobs that were to be performed by the Los Angeles drivers accompanying the preproduction team from California. The term "cover driver," as defined by appellants, refers to hiring a local union member to "cover" for a job that actually is performed by a union member from another jurisdiction. Thus, the employer must hire two workers for the same job, when the work is performed solely by the employee from a foreign jurisdiction. The cover driver thereby receives an unearned salary. Brown initially balked at the proposal. He told Civitello that he never had used cover drivers and that he had no jobs for them to do. Civitello responded that Universal was required to hire cover drivers if it expected to employ teamsters on the motion picture and if it expected to be able to film it in the Albany area. Civitello also suggested the possibility of a work stoppage if cover drivers were not hired. Brown agreed to hire four cover drivers.

Filming began in January 1981. In April 1981, Daniel Slusser, a vice president and general manager of Universal, became aware that cover drivers were being paid by Universal in connection with the filming of "Ghost Story." Slusser also discovered that these cover drivers were doing no work and that several of the drivers, e.g.,

Irene Civitello, Frank Civitello and Donna Spagnola, apparently were related to some union officials. In fact, many of the cover drivers hired were not union members and were incapable of performing the jobs that they purportedly were covering. Slusser telephoned instructions to several Universal executives that payments to all cover drivers should cease. These instructions were conveyed to Civitello, who then spoke to Slusser. Slusser informed him that the cover drivers would be required to work and would not be paid unless they worked. Civitello responded that Slusser would have to speak to Robilotto.

Later that day, all three appellants met with William Gray, a production supervisor, who repeated that Universal would not pay for non-working cover drivers. Robilotto became angry and began swearing, threatening that they would either pay or he would "shut them down." Gray then arranged for Robilotto to speak to Slusser. Robilotto repeated his threat to Slusser. Slusser agreed to meet with Robilotto in Arizona. The meeting took place in May 1981 and lasted for approximately 15 minutes. After the meeting, Slusser called a Universal executive and told him to continue paying the cover drivers for the remaining two weeks of filming.

At trial, both Brown and Gray testified that they felt threatened by Civitello and Robilotto respectively, and that they paid the cover drivers only in response to those threats. Four cover drivers also testified, including Irene Civitello, ex-wife of appellant Civitello, and several longtime friends of Spagnola. Each testified that they received little or no money from Universal, and several testified that Spagnola had gotten them jobs to facilitate their repayment to him of gambling debts. Universal paid a

total of approximately $50,000.00 for the "services" of these four cover drivers.

B. *The Bank Loan Scheme*

In July 1981, Robilotto and Spagnola contacted Charles Moyses, then vice-president of Fulton County National Bank and an unindicted coconspirator in this case, informing him that they were connected to the local teamsters union and requesting a loan of $150,000.00 to purchase a restaurant in Saratoga Springs, New York. Moyses informed them that it would be necessary to deposit $100,000.00 in the bank in connection with the loan, and asked if they could get deposits from their union. Robilotto responded affirmatively. He later called Moyses to inform him that Health and Welfare Fund certificates of deposit would be transferred to the bank when they matured. Robilotto also told him that Herbert Bender, who was an official of the Health and Welfare Fund, would arrange the transfers. Shortly thereafter, Bender called Moyses to inform him that $300,000.00 would be wired to the bank. That deposit was made in December 1981. On at least two other occasions, Spagnola and Robilotto obtained loans from the bank conditioned on further union deposits. On both occasions, further Health and Welfare Fund deposits were made. Moyses testified at trial that the entire series of loans to Robilotto and Spagnola, totalling more than $474,000.00 over the course of a year, had been approved because Robilotto had arranged for substantial deposits in the Fulton County National Bank from the Health and Welfare Fund.

In his defense, Robilotto offered testimony from John C. Peet, Jr., a trustee of the Health and Welfare Fund, as

to the Fund's decision to transfer deposits to the Fulton County National Bank, and from his wife, who testified that she was hired as a cover driver and performed work on the film. Civitello testified in his own behalf. Spagnola did not testify and called no witnesses.

After a two-week jury trial, appellants were found guilty on all 50 counts. Spagnola and Robilotto were sentenced to a total of four years' imprisonment and Civitello was sentenced to a total of six years' imprisonment. In addition, judgments of forfeiture were entered against all three appellants. Robilotto was ordered to forfeit to the United States $107,354.00, to be paid as restitution to the Fulton County National Bank, and to forfeit his position as business agent for Local 294. Civitello was ordered to forfeit $27,940.00 to the government. Spagnola was ordered to make restitution to his victims in the amount of $143,439.00 and to forfeit $173,260.00 to the United States. This appeal followed.

II. DISCUSSION

A. *Robilotto's Claims*

1. *Hobbs Act*

Robilotto's primary contention on appeal is that the government's Hobbs Act charge failed to state a criminal offense and that the evidence was insufficient to support his conviction on that charge. We disagree.

The Hobbs Act, 18 U.S.C. § 1951, proscribes extortion affecting interstate commerce, as well as attempts and conspiracies to do so. Extortion, as defined in the Act, means "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened

force, violence or fear." *Id.* § 1951(b)(2). Wrongfully induced fear includes fear of economic loss that would result from work stoppages or strikes. *United States v. Clemente*, 640 F.2d 1069, 1078 (2d Cir.), *cert. denied*, 454 U.S. 820 (1981); *United States v. Palmiotti*, 254 F.2d 491, 495-96 (2d Cir. 1958); *United States v. Postma*, 242 F.2d 488, 493 (2d Cir.), *cert. denied*, 354 U.S. 922 (1957); *United States v. Varlack*, 225 F.2d 665, 669 (2d Cir. 1955); *see also United States v. Capo*, 817 F.2d 947, 951 (2d Cir. 1987) (en banc) (listing elements of wrongfully induced fear of economic loss).

In *United States v. Enmons*, 410 U.S. 396 (1973), the Supreme Court "carved out a labor exception to the traditional law of extortion codified in the Hobbs Act." *United States v. Zappola*, 677 F.2d 264, 269 (2d Cir.), *cert. denied*, 459 U.S. 866 (1982). The Court held that, in a labor context, the Hobbs Act "does not apply to the use of force to achieve legitimate labor ends." *Enmons*, 410 U.S. at 401. However, the Supreme Court emphasized that when labor union officials use force for a wrongful purpose, e.g., to obtain wages for "imposed, unwanted, superfluous and fictitious services of laborers," prosecution would be appropriate under the Hobbs Act. *Id.* at 408 (quoting *United States v. Green*, 350 U.S. 415, 417 (1956)).

Although Robilotto faults the district court's failure to charge the jury with regard to his so-called *Enmons* defense, he does not urge reversal of his conviction for Hobbs Act conspiracy on that ground. Rather, Robilotto asserts that his conviction should be reversed based on his contention that *Enmons* demonstrates the inapplicability of the Hobbs Act to the instant case. Robilotto's argument is unconvincing.

Apparently conceding that the cover drivers were both superfluous and fictitious, Robilotto argues that the demand to pay cover drivers was neither imposed upon, nor unwanted by, Universal because Universal eventually "agreed" to pay the cover drivers. However, Universal consented to payment of those salaries only after threats of labor unrest made by Civitello and later by Robilotto. Under Robilotto's singularly circular logic, once Universal consented to making extortionate payments upon pain of labor strife, that consent would then evidence Universal's willingness to accept the previously unwanted contract term. At most, Universal's subsequent agreement to hire the cover drivers demonstrates only that appellants' extortion was successful. Moreover, the cover drivers at issue here, for the most part, were not members of the union, performed no work, and were incapable of performing the jobs that they purportedly were covering. It would be difficult to imagine a more obvious instance of imposed, unwanted, superfluous and fictitious labor services. *See United States v. Green*, 350 U.S. 415, 417 (1956). Appellants' attempts to force Universal to hire cover drivers clearly fall within the type of illegitimate labor activity proscribed in *Green*. We hold, therefore, that the Hobbs Act indictment against appellants stated a criminal offense, and that the exception envisioned in *Enmons*, for legitimate union activity is inapplicable to the instant case.

Robilotto also claims that the evidence was insufficient to support his conviction for Hobbs Act conspiracy. Under the well-established standards for challenges to sufficiency of the evidence, a defendant bears a heavy burden. *United States v. Losada*, 674 F.2d 167, 173 (2d Cir.), *cert. denied*, 457 U.S. 1125 (1982). "A jury's

verdict will be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." *United States v. Nersesian*, slip op. 4063, 4122 (2d Cir. June 29, 1987) (citation omitted). The reviewing court "must credit every inference that could have been drawn in the government's favor," *United States v. Giraldo*, slip op. 3365, 3382 (2d Cir. June 4, 1987) (citation omitted), and must "affirm the conviction as long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt." *Id.* (citations omitted). Robilotto has failed to meet this burden.

The evidence adduced at trial amply supports Robilotto's conviction for Hobbs Act conspiracy. The evidence demonstrates that Brown was induced to pay for unwanted cover drivers by direct threats of labor unrest from coconspirator Civitello. Brown testified that he agreed to pay the cover drivers solely because he feared costly work stoppages. There was ample evidence that Robilotto exploited this fear by threatening Gray and Slusser with work stoppages when they expressed Universal's desire to discontinue payments to "no-show" cover drivers. Gray testified that he feared labor strife as a result of Robilotto's threats. The evidence also sufficiently established that Robilotto knowingly joined the conspiracy to extort money from Universal. Robilotto was the business agent for the union on the film and assigned Civitello to be the job steward for the film. Upon learning that Universal no longer wished to pay for the unwanted cover drivers, Robilotto repeated Civitello's extortionate threats to Universal in strong terms. In light of the foregoing and of all of the evidence presented, the jury was entitled to infer that Robilotto was acting in

concert with Civitello as part of a conspirational agreement to extort money from Universal. See *United States v. Alessi*, 638 F.2d 466, 475-76 (2d Cir. 1980).

2. *Receiving Benefits to Influence the Operation of an Employee Welfare Plan*

Robilotto contends that his conviction under 18 U.S.C. § 1954 should be overturned because there was insufficient evidence that he exercised control over the Health and Welfare Fund, and that loans extended solely to Spagnola should not have been included in the charges against him. We disagree.

Section 1954 prohibits an agent or officer of an employee organization, any of whose members are covered by an employee welfare benefit plan, from receiving "any . . . loan, money, or thing of value because of or with intent to be influenced with respect to, any of [his] actions, decisions, or other duties relating to any question or matter concerning such plan." 18 U.S.C. § 1954. This statutory proscription extends to "all persons who exercise control, direct or indirect, authorized or unauthorized[,] over the fund," *United States v. Palmeri*, 630 F.2d 192, 199 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 & 983 (1981); *see United States v. Friedland*, 660 F.2d 919, 925 (3d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982), including business agents of a local union who exercise influence over employee welfare benefit funds. *Palmeri*, 630 F.2d at 198-200.

Undisputed evidence demonstrated that Robilotto, as business agent for Local 294, was a union officer or agent covered by section 1954 and that the Health and Welfare Fund was an employee welfare benefit plan within the purview of the statute. Robilotto contends essentially that

there was no evidence that he wielded sufficient influence to cause Health and Welfare Fund deposits to be made at the Fulton County National Bank. His argument fails for two reasons. First, section 1954, on its face, does not necessarily require proof that the malefactor actually possessed the ability to influence a welfare fund's investment decisions. The statute prohibits a union officer from accepting anything of value "because of or with intent to be influenced with respect to" any of his actions, decisions or duties concerning the fund. This statutory language has been interpreted to proscribe "acceptance of payment with the stated purpose of exercising one's influence . . ., regardless of capacity to do so." *United States v. Soures*, 736 F.2d 87, 90 (3d Cir. 1984) (construing *Friedland*, 660 F.2d at 925-26), *cert. denied*, 469 U.S. 1161 (1985); *cf. United States v. Romano*, 684 F.2d 1057, 1064 (2d Cir.) (statute prohibits receipt of things of value resulting from union pension fund investment decisions, regardless whether receipt involved corrupt transaction), *cert. denied*, 459 U.S. 1016 (1982). The evidence adduced at trial amply demonstrates that Robilotto's stated intention was to influence the Health and Welfare Fund's investment decisions when he accepted the loans from Moyses. Moyses testified that Robilotto told him in a telephone conversation that Health and Welfare Fund certificates of deposit would be transferred to the bank and that Herbert Bender, a Health and Welfare Fund official, would call to arrange the transfer. This testimony amply supports the jury verdict.

Second, the evidence adduced at trial clearly supports a finding that Robilotto did, in fact, influence the Health and Welfare Fund's investment decisions. Moyses testified that, shortly after his telephone conversation with

Robilotto, Bender left a message for Moyses stating that a deposit of $300,000 would be wired to the Fulton Bank. That deposit was made in December 1981. On two later occasions, the Health and Welfare Fund made deposits of $100,000 after Robilotto and Spagnola were advised that further deposits were necessary to obtain additional personal loans.

Robilotto contends that, because Moyses referred in his testimony to Robilotto's promise to supply "union funds" in exchange for loans, the evidence failed to show that Robilotto promised Health and Welfare Fund deposits. However, it is obvious from even the most cursory review of the testimony that Moyses used the terms "union funds" and "Health and Welfare Funds" interchangeably. Moreover, Moyses testified at one point that Robilotto claimed to have arranged for deposits to be made from the Health and Welfare Fund. *See* Trial Transcript at 1324. There is a clear pattern of demands for loans, followed by promises of deposits, followed closely by deposits of Health and Welfare Fund assets.

Robilotto's claim that there was insufficient evidence to support the jury verdict under section 1954 involving the loans to Spagnola requires scant discussion. Contrary to Robilotto's contention, the evidence clearly shows that Robilotto was the central figure in the loan scheme—he initiated the entire scheme, knowingly enabled Spagnola to obtain loans contingent upon Health and Welfare Fund deposits, participated in discussions regarding the Spagnola loans, and received the proceeds from some of them. Accordingly, there was sufficient evidence to convict Robilotto as a principal. In addition to Robilotto's receipt of the proceeds of some of the loans, his ability to control the disposition of loans to Spagnola can be

considered "a thing of value" under section 1954. *See United States v. Schwartz*, 785 F.2d 673, 681 (9th Cir.) ("Congress clearly intended the scope of *thing of value* to include intangibles"), *cert. denied*, 107 S. Ct. 290 (1986); *cf. United States v. Girard*, 601 F.2d 69, 71 (2d Cir.) (phrase "thing of value" generally is construed to cover intangibles), *cert. denied*, 444 U.S. 871 (1979).

3. *Substantive RICO and RICO Conspiracy*

Robilotto contends that the predicate acts relating to the bank loans, charged in both the substantive RICO and RICO conspiracy counts, were insufficiently related to Local 294, the charged RICO enterprise. Therefore, according to Robilotto, because only one other predicate act—the Hobbs Act charge—properly could be alleged as part of a pattern of racketeering activity, his RICO convictions must be reversed. We reject Robilotto's contentions.

Under section 1962(c), it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." 18 U.S.C. § 1962(c). Conspiracies to violate section 1962(c) also are proscribed. *Id.* § 1962(d). Unions expressly are included in the statutory definition of the term "enterprise." *Id.* § 1961(4) (1982). Although the statute itself does not specify "the degree of interrelationship between the pattern of racketeering and conduct of the enterprise's affairs," *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981), we previously have identified two situations that would fall within the

statutory proscription: first, when a defendant "is enabled to commit the predicate offenses *solely by virtue of his position in the enterprise* or involvement in or control over the affairs of the enterprise," *id.* (emphasis added); or second, when "the predicate offenses are related to the activities of that enterprise," *id.* *See United States v. LeRoy*, 687 F.2d 610, 617 (2d Cir. 1982) (section 1962(c) "does not require that predicate acts be in furtherance of the enterprise"), *cert. denied*, 459 U.S. 1174 (1983); *see also United States v. Provenzano*, 688 F.2d 194, 200 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982); *cf. United States v. Cauble*, 706 F.2d 1322, 1332-33 (5th Cir. 1983) (adding requirement that predicate acts had some effect on the enterprise), *cert. denied*, 465 U.S. 1005 (1984).

Robilotto argues that the government failed to demonstrate a nexus between the bank loans procured as a result of promises of Health and Welfare Fund deposits and the affairs of Local 294. However, there was abundant evidence that the Fulton County National Bank extended the loans to Robilotto and Spagnola solely because Robilotto claimed, as a result of his position as a business agent for Local 294, to have the ability to secure large deposits from the Health and Welfare Fund. As discussed above, the evidence strongly supports the conclusion that Robilotto, in fact, used his influence to secure the Health and Welfare Fund deposits. Clearly, therefore, the charges relating to the bank loans properly were included as predicate acts, and Robilotto's substantive RICO and RICO conspiracy convictions were appropriate.

B. *Spagnola's Claims*

The majority of Spagnola's claims are made without citation to legal authority or to the record, and are, in any

event, without merit. We therefore will address only his claim that the district court erred in granting a judgment of forfeiture against him.

Upon sentencing, the district court entered a judgment of forfeiture of the monetary proceeds of Spagnola's illegal racketeering activity. In his brief to this court, Spagnola contends that the judgment is invalid because he no longer retains those ill-gotten funds. Spagnola's contention is premised upon his erroneous belief that the government should be required to trace the proceeds of his racketeering activities to identifiable assets and establish that he had the proceeds at the time of forfeiture.

The RICO forfeiture provision in effect at the time Spagnola committed the offenses for which he was convicted, *see United States v. Lizza Indus., Inc.*, 775 F.2d 492, 497 n.3 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986), provided that a person convicted under section 1962 "shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1982." 18 U.S.C. § 1963(a)(1) (1982) (amended by Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 302, 98 Stat. 2040 (1984)). "Interest," within the meaning of the pre-amendment version of section 1963(a), included proceeds and profits received as a result of racketeering activity, *Russello v. United States*, 464 U.S. 16, 22 (1983), as the amendments to section 1963 make clear, see 18 U.S.C. § 1963(a)(3) (Supp. III 1985).

Section 1963, unlike other forfeiture statutes, imposes forfeiture "directly on an individual as part of a criminal prosecution rather than in a separate proceeding in rem against the property subject to forfeiture." *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). *See, e.g., United States v. Busher*,

817 F.2d 1409, 1412 n.4 (9th Cir. 1987); *United States v. Kravitz*, 738 F.2d 102, 106 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *Cauble*, 706 F.2d at 1349. "Since RICO forfeiture is a sanction against the individual defendant rather than a judgment against the property itself, 'it follows the defendant as a part of the penalty and thus it does not require that the government trace it, even though the forefeiture is not due until after conviction.' " *United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir. 1985) (en banc) (quoting *United States v. Conner*, 752 F.2d 566, 576 (11th Cir.), *cert. denied*, 106 S. Ct. 72 (1985)), *cert. denied*, 106 S. Ct. 1186 (1986); *see also Lizza Indus., Inc.*, 775 F.2d at 499 (Van Graafeiland, J., concurring in part and dissenting in part on other grounds) ("[t]he question whether the proceeds of illegal activity must still be in existence in order to be subject to forfeit . . . is now generally answered in the negative"); *cf. United States v. Amend*, 791 F.2d 1120, 1127 n.6 (4th Cir.) (applying *Ginsburg* rationale to continuing criminal enterprise forfeiture under 21 U.S.C. § 853(c) (Supp. III 1985)), *cert. denied*, 107 S. Ct. 399 (1986). Because the forfeiture imposed upon Spagnola is *in personam*, the government need not trace the proceeds of Spagnola's racketeering activities to identifiable assets.[3] The judgment of forfeiture, therefore, is valid. In addition, although Spagnola alleged that the judgment of forfeiture was violative of the eighth amendment, he has failed to identify any eighth amendment violation arising from the

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3 We note in passing that Spagnola's sole contention at oral argument was that the judgment of forfeiture constituted a "bill of attainder." Because Spagnola's ill-conceived "bill of attainder" argument was inadequately presented at oral argument and is, in any event, without merit, we have elected to address only those contentions raised in his brief.

forfeiture, and none is apparent to us. *See Lizza Indus., Inc.*, 775 F.2d at 498; *Huber*, 603 F.2d at 397.

C. *Civitello's Claims*

Civitello claims that the charges against him were barred by the applicable five-year statute of limitations, 18 U.S.C. § 3282 (1982), because many of his alleged criminal acts occurred more than five years prior to April 24, 1986, the date on which the superseding indictment was filed. These acts, for the most part, occurred less than five years prior to March 14, 1986, the date on which the initial indictment was filed. Civitello's argument evinces a misunderstanding of the well-established standards for evaluating statute of limitations claims involving superseding indictments. "Once an indictment is brought, the statute of limitations is tolled as to the charges contained in that indictment." *United States v. Grady*, 544 F.2d 598, 601 (2d Cir. 1976) (citations omitted). If brought during the valid pendency of the initial indictment, a superseding indictment containing substantially the same charges as the superseded indictment "should have no effect on the initial tolling of the statute of limitations so long as the defendant is not significantly prejudiced by the delay." *United States v. Panebianco*, 543 F.2d 447, 454 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977).

Here, the superseding indictment made only minor technical changes to the indictment. In addition, Civitello has alleged no prejudice arising from the filing of the superseding indictment, and we perceive no such prejudicial effect. We hold, therefore, that the charges against Civitello properly were measured as of the filing date of the initial indictment.

Civitello's remaining claims require little discussion. First, the testimony of Irene Civitello, appellant's ex-wife, did not violate the privilege against adverse spousal testimony because she did not testify about any confidential marital communications. *See, e.g., Pereira v. United States*, 347 U.S. 1, 6 (1954); *United States v. Estes*, 793 F.2d 465, 467 (2d Cir. 1986). Second, Civitello's motion for severance due to his lack of participation in the bank loan scheme properly was denied. The substantial evidence against him could be considered separately, and he failed to demonstrate any prejudice arising from the joinder of defendants in this case. *See United States v. Garza*, 664 F.2d 135, 142-43 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982); *see also United States v. Toliver*, 541 F.2d 958, 963 (2d Cir. 1976). Finally, Civitello's claim that he was denied the effective assistance of counsel is predicated on his belief that counsel should have raised the aforementioned claims. Since we find those claims to be without merit, we similarly reject his claim of ineffective assistance.

III. CONCLUSION

We have examined carefully appellants' remaining claims and find them to be without merit. The judgments of the district court are, in all respects, affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 86-1513

UNITED STATES OF AMERICA,

Appellee,

against

J. MICHAEL ROBILOTTO, LOUIS SPAGNOLA and ANTHONY CIVITELLO,

Defendants-Appellant.

APPELLANT ROBILOTTO'S PETITION FOR REHEARING

Preliminary Statement

Pursuant to Fed.R.App.P. 40(a), Appellant J. Michael Robilotto respectfully petitions for a rehearing of his appeal from a judgment of the United States District Court for the Northern District of New York (Hon. Lee P. Gagliardi) entered December 8, 1986, convicting him upon a jury verdict, after a joint trial with Louis D. Spagnola and Anthony Civitello, of violations of 18 U.S.C. §§ 1951, 1962 (c) and (d), 1954 (10 counts) and 371 and imposing respective concurrent and consecutive sentences of imprisonment, the longest of which is six (6) years. The judgment also includes the court-ordered forfeiture to the United States of

$107,354, to be offset and credited by any sums to be paid as restitution to the Fulton County National Bank. This Court affirmed the judgment in an order entered September 11, 1987.

REASONS FOR GRANTING THE PETITION

In concluding as it did, that defendant J. Michael Robilotto was properly convicted in this case of § 1951, § 1954 and § 1962 violations, it is respectfully, yet most strenuously, urged that this Court wholly overlooked and completely misapprehended crucial and dispositive points of law and fact that underlay the trial herein. It is our firm view that were the Court, upon this petition for rehearing, to fully appreciate the extent of the omissions and misapprehensions which permeate its decision, reversal of defendant's conviction and dismissal of certain counts will be seen to be the only appropriate remedies.

I. Convictions Under 18 U.S.C. § 1951

A. Omissions on the Law

In its discussion of the *Hobbs Act*, the panel failed to acknowledge two essential points underlying the matter before the court. Firstly, as we earlier urged in appellant's brief at pp. 31-32,

> . . .in labor cases, both the "means" and the "objective" must be wrongful within the meaning of § 1951 and such must be appropriately conveyed to the jury. *Cf. United States* v. *Clemente*, 640 F.2d 1069, 1077 (2d Cir. 1981). Accordingly, "before a *Hobbs Act* violation will lie, it must be demonstrated that the extortionist has no legitimate or lawful claim to the property he was attempting to obtain". *United States* v. *Baudin*,

486 F.Supp. 403, 405 (S.D.N.Y., 1980, Duffy, J.). In the final analysis therefore, it must be proved by the government beyond a reasonable doubt, if a later conviction is to be sustained, that the anticipated goals of the actor were wholly illegitimate. *Cf. United States* v. *Stofsky*, 409 F.Supp. 609, 616 (S.D.N.Y. 1973, Pierce J.).

Secondly, as we urged in a post-argument letter to this court following counsel's becoming apprised of the recent holding in *United States* v. *Capo*, 817 F.2d 947 (2d Cir. 1987) (*en banc*), the Court held therein that evidence that the victim clearly and unequivocally feared that harm would befall him as a result of a defendant's purported extortionate threat is a *sine qua non* of a valid *Hobbs Act* prosecution. Absent such proof, counts alleging § 1951 violations will not survive challenges to evidentiary sufficiency.

It is respectfully urged that if the panel, upon this application, will thoroughly scrutinize those parts of the record recalled herein, it will determine that the deficiencies in its decision discussed below, when applied to the foregoing principles, impel the relief sought in this petition.

B. Factual Omissions and Misapprehensions

(1) Initial Agreement As to Cover Drivers.

Wholly unrecognized in the Court's opinion is the limited, if not non-existent, role which defendant Robilotto had in creating the agreement concerning cover drivers in the first instance. Moreover, on the only occasion prior to defendant's April/May 1981 conversation and meeting with Daniel Slusser wherein defendant was present when cover drivers were discussed, he fully recognized their need to be present at the work scene.

Thus, unmentioned in the Court's opinion is that the *sole proof* concerning defendant's initial discussions about "cover drivers" involved Donald Owens' October, 1980 trip to Albany wherein he twice met with Civitello and Robilotto. It was at either the first or second meeting that the subject was broached, with all participants having the clear understanding that any cover drivers were to be physically present at the scene (Owens: 411).[1] Accordingly, completely overlooked by the panel was that prior to his April/May discussions with Slusser, defendant's *only* involvement with respect to the subject of cover drivers in this trial record allowed for the singular inference that he believed such drivers not to be "superfluous", *United States* v. *Greene*, 350 U.S. 415, 417 (1956), but actually present at the job site. There is simply no proof that the defendant was ultimately even aware that cover drivers might not have been present.[2]

Similarly, the panel likewise overlooked, and thus failed to recall, that when the movie company went to Vermont, it was Universal's Robert Brown—not the defendants—who insisted that the cover drivers not be present because Universal did not want the additional expense of their rooms and meals (Brown: A150; A202; A232). Obviously, the only resulting inference to be drawn is that when in Albany, all persons expected the drivers to be present as per the defendant's and Donald Owens' earlier expressed understandings.

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1. Numerical references are to the Minutes of Trial; those preceded by the letter "A" are to Appellants' Joint Appendix.

2. Contrary to the Court's observations (Slp. Opn. 5194), defendant Robilotto's wife was never a cover driver. *See Bennett*: 1230. She was a *bona fide* Teamster possessing a Class "C" truck license who legitimately worked on the movie by any view of the case (1851-1852).

In short, the Court's observations that defendant 'apparently concede[s] . . . that the cover drivers were both superfluous and fictitious'' (Slp. Opn. 5196), and that ''[t]he cover driver thereby received an unearned salary'' (*id.*, 5191), are clearly erroneous. *At least* as far as Robilotto is concerned, the record only suggests the view that he believed cover drivers were legitimately present and that their inclusion in the labor agreement was the direct result of Universal's free will.[3]

There is more. On page 5191 of its slip opinion, the panel noted that,

> Civitello responded [to Brown] that Universal was required to hire cover drivers if it expected to employ Teamsters on the motion picture and if it expected to be able to film it in the Albany area. Civitello also suggested the possibility of a work stoppage if cover drivers were not hired. Brown agreed to hire four cover drivers.

Left unchallenged, such an observation allows for the sole conclusion, as the Court so drew, that Universal was completely helpless and agreed to hire the drivers only out of fear. *Cf. United States* v. *Greene, supra.* That is just not supportable.

Aside from the fact, as noted above, that Slusser testified that the cover drivers were the subject of negotiation and

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3. As we noted in our brief (Page 15, Note **), but which the Court ignored, this was wholly supported by Slusser's own testimony wherein he stated that the hiring of the cover drivers had earlier become an item of negotiation and that, although rare, there is nothing unlawful about it (A402-403). In fact, Slusser had no problem with employing cover drivers; he just wanted them to be present—a position never disagreed with by Robilotto, yet which, as noted, was violated in Vermont by Universal itself at Robert Brown's own insistence. Indeed, all parties understood that the cover drivers would be available when necessary (A150, A232, A233).

discussion, the point is also indisputable that Universal never had to pay additional drivers if it chose not to do so. All it had to do was send the California drivers back home and employ the local drivers alone.[4] Obviously, it chose otherwise.

Additionally, Brown's negotiating position was not exactly grounded in weakness. As he himself admitted at the trial, he might very well have countered to Civitello as a "negotiating technique" that "if you don't accept the contract we're offering, we're going to pull the picture out of here" (A207).

The fact remains, therefore, contrary to this court's conclusion, that there is simply no proof that "Universal consented to payment of those [cover drivers'] salaries after threats of labor unrest made by Civitello and later by Robilotto", or that "Universal consented to making extortionate payments upon pain of labor strife . . ." (Slp. Opn. at 5196). The *only* fair reading of the record is that while Civitello—absent proof of Robilotto's knowledge—had made apparent threats to Brown, Brown, in turn, likewise made threats to Civitello. Thus, the ultimate hiring of cover drivers was *never* shown to have been anything other than what Robilotto justifiably believed—and which Slusser confirmed—to have been the direct result of arm's length negotiations. On these premises, the drivers were simply never proven to have been "imposed, unwanted, superfluous

4. The Court's conclusion that "many of the cover drivers hired were not union members and were incapable of performing the jobs that they purportedly were covering" (Slp. Opn. 5192) is also not supported by the record. Indeed, it was not essential that all workers hired initially be union members (Bennett: 1227). And as to the specific drivers involved, no proof showed that they could not do the job were they ever called to do so. Moreover, all had been approached by either Civitello or Spagnola—not by defendant Robilotto, who rarely was present at the Holiday Inn offices.

or fictitious" *United States* v. *Enmons*, 410 U.S. 396, 408 (1973); *United States* v. *Greene*, *supra*, at least as far as defendant was concerned.

(2) The Robilotto "Threat" Evidence

Since, as shown above, the "objective" of Robilotto's actions were never proven to have been inappropriate in his mind, *cf. United States* v. *Clemente*, *supra*, it is now necessary to examine how the panel dealt with proof of the "means" which he employed, *viz.*, the purported "threats" to Daniel Slusser.

On page 5192, the Court observed that,

> [a]t trial, both Brown and Gray testified that they felt threatened by Civitello and Robilotto respectively, and that they paid the cover drivers only in response to those threats.

In the first place, there is simply no evidence that defendant J. Michael Robilotto ever met with Robert Brown. And while defendant did meet with Gray in Gray's office immediately prior to speaking on the telephone with Daniel Slusser, there is not one scintilla of proof as to Gray's having felt threatened in response to Robilotto's purported statements (A433-A437).[5] *Cf, United States* v. *Capo*, *supra*.

Secondly, wholly ignored by the panel was Daniel Slusser's crucial testimony. Indeed, if the government were ever to meet its "fear" burden under *Capo*, it was Daniel Slusser alone who was to be utilized for that purpose. What did he say? It was clearly Slusser's testimony that while "concerned" when Robilotto told him he might

5. It is worthwhile to note that Gray could not refute counsel's suggestion on cross-examination that Robilotto had only stated that Universal had to live up to its agreement, as opposed to what the witness "felt" should have been the agreement (A438-A439).

shut down the movie, he felt much "easier" that the two, in the very same conversation, had agreed to meet that weekend in Arizona (A374, A397, A420). And after that Arizona meeting where the two continued their discussions and where Robilotto wholeheartedly agreed with Slusser's misgivings, the Universal representative clearly recalled not having felt threatened, with any previous anxiety having disappeared (A384, A392, A398). *Cf. United States* v. *Capo, supra.* In fact, in a later memorandum to Smith, and as also ignored by the panel, Slusser wrote, "general discussions went very well. Mike understood our problem and was cooperative in providing us with his assistance" (A335, A384). Moreover, nothing thereafter occurred to interrupt filming (A330).

In short, the panel herein misapprehended facts that it relied on and clearly omitted crucial portions which undoubtedly militate against the court's ultimate conclusion. Nonetheless, the record is clear and cannot be changed. Defendant J. Michael Robilotto was never proved to have done anything but try to enforce, as was his responsibility, what he reasonably believed to be a properly negotiated labor agreement (which, as noted, included the justifiable belief that cover drivers would be present at the scene). *United States* v. *Enmons, supra.* And since he never put Slusser—the only significant witness on this point—in fear of an actual work stoppage following either of their crucial discussions, the evidentiary insufficiency of the § 1951 count is completely undisputed. *United State* v. *Capo, supra.* Hence, not only was there absent "ample" evidence (Slp. Opn. 5197) that ". . . Robilotto exploited this fear by threatening Gray and Slusser with work stoppages when they expressed Universal's desire to discontinue payments

to 'no show' cover drivers" (*id.*), but there is no evidence of fear at all. The proof only showed that Robilotto believed, and thereby claimed, Universal was breaking what he understood to be a valid agreement.

Additionally, the evidence is non-existent "that Robilotto knowingly joined the conspiracy to extract money from Universal" (*id.*). To the contrary, there is simply no proof whatsoever that Robilotto was aware that Civitello and Spagnola had been pocketing a dime—or that non-present cover drivers were being paid at all.[6] Clearly, J. Michael Robilotto is not a criminal, but only a tough-talking labor leader.

Most respectfully, on this unassailable analysis, the panel's support for its upholding of Count Thirty-Three cannot survive. It follows that the *Hobbs Act* charge must be dismissed. On this view, separate and apart from that issue discussed below, a new trial must be granted on the § 1954 and § 1962 counts for those reasons stated in Point V of appellant's brief.

II. Convictions Under 18 U.S.C. §§ 1954, 1962(c)[7]

Upon finding that ". . . it is obvious from even the most cursory review of the testimony that Moyses used the term 'union funds' and 'health and welfare funds' interchangeably . . ." (Slp. Opn. at 5200); that "Moyses testified at one point that Robilotto claimed to have arranged for deposits to be made from the Health and Welfare Fund. See

6. Given Robilotto's manner of operation, as shown on this record, in bestowing great discretion upon his shop steward, it is simply not inconceivable that Civitello left him completely in the dark as to the facts. *See, e.g.*, Bennett: 1182.

7. The court's opinion erroneously included Civitello in the § 1954 charges (Slp. Opn. 5190); it was co-defendant Spagnola.

Trial Transcript at 1324" (*id.*);[8] and that "[Robilotto] . . . later called Moyses to inform him that Health and Welfare Fund Certificates of Deposit would be transferred to the bank when they matured" (Slp. Opn. 5193), this Court determined that there was evidentiary sufficiency in support of the § 1954 counts. As the Court explained:

> The evidence adduced at trial amply demonstrates that Robilotto's stated intention was to influence the Health and Welfare Fund's investment decisions when he accepted loans from Moyses. Moyses testified that Robilotto told him in a telephone conversation that Health and Welfare Fund Certificates of Deposit would be transferred to the bank and that Herbert Bender, a Health and Welfare Fund official, would call to arrange the transfer. (Slp. Opn. 5199).

The fact is that there is simply no such evidence in this record. As a consequence, for the court to arrive at such conclusion regarding defendant's intent and thereby further determine that the "evidence at trial clearly supports a finding that Robilotto did, in fact, influence the Health and Welfare fund investment decisions" (Slp. Opn. 5199) based on his "having arranged for substantial deposits in the Fulton County National Bank from the Health and Welfare Fund" (*Id.* 5193), is, most respectfully, to fall into the same misapprehension which plagued the government's

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8. The Court's citation to page 1324 of the trial transcript in support of its reference to the Health and Welfare fund reflects the Government's long-time confusion over the separate funds that were involved in this case. To be sure, Moyses referred to the "pension and welfare CD that was maturing at another bank". But while Robilotto was indeed a trustee of the Pension Fund, such was wholly distinct from the Health and Welfare Fund underlying the indictment with which Robilotto had no connection whatsoever (Bennett: 1245-1246; 1257). Robilotto simply *never* referred to the completely distinct Health and Welfare Fund—the only basis for his indictment.

brief. The panel's findings simply cannot withstand the thrust of the indisputable proof.

In this regard, all apparently agree that the most legitimate way to determine whether defendant had ever harbored the intention of influencing the Health and Welfare Fund is to examine the proof on which the Court relied in furtherance of finding that the defendant had in fact done so. As in part recalled above, the panel determined that,

> Moyses testified that shortly after his telephone conversation with Robilotto, Bender left a message from Moyses stating that a deposit of $300,000 would be wired to the Fulton Bank. That deposit was made in December 1981. On two later occasions, the Health and Welfare Fund made deposits of $100,000 after Robilotto and Spagnola were advised that further deposits were necessary to obtain additional personal loans. * * * [I]t is obvious from even the most cursory review of the testimony that Moyses used the terms "union funds" and "health and welfare funds" interchangeably. Moreover, Moyses testified at one point that Robilotto claimed to have arranged for deposits to be made from the Health and Welfare Fund. *See*. Trial Transcript at 1324.[9] There is a clear pattern of demands for loans followed by promises of deposits of Health and Welfare Fund assets. Slp. Opn. at 5199-5200).

The foregoing findings can only stand if the Court commits the one major omission which it did, and which likewise serves as the hallmark of the government's brief, *viz.*, virtually ignoring the unassailed testimony of John C. Peet, one of the two trustees of the Health andWelfare Fund. For only in such an evidentiary vaccum is it able to be concluded that "Robilotto did in fact influence the Health

9. *See* Note 7, *supra*.

and Welfare Fund's investment decisions" (Slp. Opn. 5199).[10]

The fact is that the testimony of John C. Peet was wholly devastating, both to the government's case and to this court's apprehension of such evidentiary offering. As we noted in appellant's brief (pp. 24-27; 42-43), Peet swore that he had met defendant Robilotto only once; that defendant, as well as the union, had absolutely no connection to the Health and Welfare Fund; that he was the one individual who decided, and who had the authority to decide, to invest in the Fulton County Bank after checking its assets; that *he* had instructed Bender to contact the bank; and that he had no knowledge of any Robilotto loan. Most respectfully, it is simply inconceivable how this court could ignore such proof in fairly determining this appeal.

On these premises, the panel's finding that ". . .Moyses used the terms 'union funds' and 'health and welfare funds' interchangeably", is irrelevant. What Moyses believed cannot change the unalterable fact that the two entities had nothing to do with each other; that Robilotto, contrary to this Court's finding with reference to page 1324 of the transcript, *never* referred to the Health and Welfare Fund; and that John Peet, quite fortuitously, decided on his own initiative, *absent any knowledge of Robilotto's loans,* to periodically invest in the bank.[11] Most

10. Such a conclusion also depends for its legitimacy on the panel's ignoring of Moyses' testimony that Bender had told him that the deposits were not collateral for the loans but would only be kept in the bank as long as the bank's interest rates were competitive (1328, 1329, 1468).

11. The Court's reference to a "clear pattern of demands for loans followed by promises of deposits . . ." (Slp. Opn. at 5200) ignores that Peet's first decision to deposit was in December whereas Robilotto's first request for a loan was five months earlier in July.

respectfully, the record can only support guilt of the charged offenses if, as did the panel, such evidence is wholly ignored.[12]

Indeed, while it was the government's theory that Robilotto promised health and welfare deposits, *all* Robilotto ever spoke of were *union* deposits or, on one occasion, pension funds deposits (1324). See *e.g.*, 1324-1328, 1332-1336, 1352-1355, 1363-1368, 1485-1486, 1495-1496. Interestingly, Herbert Bender, who might have logically been expected to support the government's theory, was never called. Undoubtedly, his grand jury testimony, which we again urge the court to review, demonstrates that the govenment was therein disappointed in its pursuit.

In sum, the proof which the Court relied on is simply not there—and that which it omitted is all encompassing. Because the Health and Welfare Fund was not improperly influenced, the § 1954 counts must fall. And because, perforce, it is equally clear that the defendant "never claimed, as a result of his position as a business agent for Local 294, to have the ability to secure deposits for the Health and Welfare Fund" (Slp. Opn. 5202), the RICO counts which resultantly suffer from an insufficient nexus with the union, the theorized enterprise, must fall as well.

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12. In this regard, it is important to remind the court, as we argued earlier (Appellant's Brief, p. 43), that "the one non-hearsay soliciting question which would have solidified defendant's complete detachment from the deposit-making process of the Welfare Fund, *i.e.*, whether Robilotto had ever asked Peet to make the deposits, was objected to by the government and sustained by the court (A460)".

CONCLUSION

THE PETITION FOR A REHEARING SHOULD BE GRANTED AND THE RELIEF REQUESTED IN APPELLANT'S BRIEF SHOULD BE ORDERED[13]

Dated: New York, New York
September 23, 1987

Respectfully submitted,

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13. The court did not address our misgivings regarding the § 371 charge in Count 48, as contained in Point IV of Appellant's Brief. We obviously renew those arguments as well.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of October one thousand nine hundred and eighty-seven.

Present: HON. WILFRED FEINBERG, *Chief Judge*
HON. J. EDWARD LUMBARD,
HON. ROGER J. MINER,
Circuit Judges,

Docket Nos. 86-1513, 86-1514, 86-1515

UNITED STATES OF AMERICA,
Appellee,

against

J. MICHAEL ROBILOTTO, LOUIS SPAGNOLA and ANTHONY CIVITELLO,
Defendants-Appellant.

A petition for a rehearing having been filed herein by the defendant-appellant J. Michael Robilotto.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ ELAINE B. GOLDSMITH
ELAINE B. GOLDSMITH
Clerk